
jurisdiction over community associations. Therefore, imposing forced entry regulations on community associations would exceed the FCC's authority under the Communications and Telecommunications Acts.

3. Section 224 Does Not Grant the FCC the Authority to Promulgate Forced Entry Regulations Through Utility Rights of Way

One of the most prevalent arguments made by the telecommunications providers supporting forced entry initiatives is that Section 224 of the Communications Act requires utilities to permit use of their easements or rights of way on community association property. They assert that the language of Section 224 includes rights of way on community association property among those that can be used for telecommunications equipment installation.⁶¹ However, the language of Section 224 itself demonstrates that utility rights of way on community association property cannot be used for installation of telecommunications equipment.

The telecommunications providers claim that since Section 224 refers to any public or private rights of way that are owned or controlled by utilities, community association property may be used by utilities or telecommunications providers. They contend that any community association property subject to a utility right of way, whether used or not, may be used. They assert that utilities have the authority to expand their easements to include any property desired by the providers to install telecommunications equipment,⁶²

⁶¹ Comments of ALTS, 23; Comments of CPI, 3; Comments of PCIA, 27,29; Comments of Teligent, 34; Comments of WCA, 19; Comments of WinStar, 54.

⁶² Comments of PCIA, 30.

including rooftops.⁶³ They contend that utilities should be required to use their eminent domain power to expand their rights of way for telecommunications providers, even if the utility is not using the property sought by the telecommunications providers.⁶⁴

These proposals are constitutionally and statutorily infirm. Installation of telecommunications equipment on community association property without the association's consent would be a taking of community association property. Just because utilities have rights of way on association property does not mean that associations cede ownership rights in their property; the property is still association property for the takings analysis.⁶⁵ While Section 224 provides compensation for takings of utility property (and thereby escaping invalidation as an unconstitutional taking under Gulf Power v. FCC⁶⁶), it includes no provision compensating community associations and other MTEs for takings of their property.⁶⁷ Since the FCC has no authority under Section 224 to provide compensation to community associations,⁶⁸ Section 224 cannot be used as a basis for justifying forced entry regulations.

Any regulation permitting utilities to expand their rights of way would conflict with many state laws regarding the scope of rights of way. Forced entry regulations redefining the scope of rights of law would redefine property law in many states. The FCC has no

⁶³ Comments of WCA, 21; Comments of WinStar, 57.

⁶⁴ Comments of AT&T Corporation (AT&T), 31; Comments of Teligent, 36; Comments of WCA, 21; Comments of WinStar, 60-61.

⁶⁵ Comments of American Electric Power Service Corporation et al, 19; Comments of ICTA, 3.

⁶⁶ 998 F. Supp. 1386 (N.D. Fla. 1998), affirmed on appeal.

⁶⁷ Comments of Electric, 10; Comments of ICTA, 3, Comments of Optel, 11; Comments of the RAA, 38. In fact, Section 224 does not apply to community associations and other MTEs at all.

⁶⁸ See I, B, *supra*.

authority, either through Section 224, any other statutory provision, or ancillary authority to redefine state property law.⁶⁹ Therefore, utilities could not expand their rights of way to include additional community association property, including rights of way. Even some telecommunications providers have acknowledged this fact;⁷⁰ the FCC should do so as well.

Due to these constitutional and statutory impediments, the FCC should not use Section 224 to permit telecommunications providers to use utility rights of way to install telecommunications equipment on community association property.

4. Any Regulation Regarding Telecommunications Provider Use of ILEC Networks Cannot Take Community Association Property

Many Comments also focused on the feasibility of unbundling ILEC networks inside community associations to permit alternative providers to use these networks for the provision of telecommunications services.⁷¹ These approaches may be feasible, as long as any regulations unbundling ILEC networks in community associations do not also provide for takings of community association property. Otherwise, the same takings issues would be present, invalidating any such regulation.

III. THE FCC SHOULD NOT ABROGATE OR PROHIBIT EXCLUSIVE CONTRACTS

⁶⁹ Comments of CAI, 17-18; Comments of the Counties, 8-9, 12; Comments of Electric, 12; Comments of ICTA, 3; Comments of Optel 12; Comments of United Telecommunications Council et al, 5-6.

⁷⁰ For example, Comments of Aldephia, 6.

⁷¹ See, for example, Comments of ALTS, 23; Comments of Cornerstone Properties, 3; Comments of ICTA, 5; Comments of the RAA, 59; Comments of Teligent, 52; Comments of WCA, 22 supporting various forms of unbundling requirements.

In this proceeding, the issue of the continued existence of exclusive contracts has been the subject of many Comments. While exclusive contracts may pose some difficulties in certain situations, the ability to enter into an exclusive contract should remain an option for community associations. A complete prohibition or abrogation of exclusive contracts would not assist in developing a fully competitive telecommunications marketplace.

Many telecommunications providers assert that exclusive contracts provide benefits to no party beside the incumbent telecommunications provider.⁷² They fail to note that in some circumstances, the promise of exclusivity is one of the few ways to attract a provider into investing the necessary capital to build the telecommunications infrastructure in an association.⁷³ Since exclusivity may at times be beneficial to community associations, they should be able to retain the option to enter into exclusive contracts.⁷⁴

Some telecommunications providers have indicated support for exclusive contracts in situations in which the interests of the MTE residents and the MTE owners converge.⁷⁵ In community associations, this is precisely the case. Individual homeowners in community associations either own or are members of the organization that owns

⁷² Comments of CPI, 17-18; Comments of First Regional, 6; Comments of MFNS, 5; Comments of PCIA, 11; Comments of RCN Corporation (RCN), 18; Comments of Teligent, 17; Comments of WCA, 29; Comments of WinStar, 25.

⁷³ Comments of Cornerstone Properties et al, 34; Comments of ICTA, 4, 7; Comments of Optel, 14, 18; Comments of the RAA, 70.

⁷⁴ Comments of CAI, 33-35; Comments of Cornerstone Properties, 33.

⁷⁵ Comments of CPI, 17; Comments of Teligent, 18.

community association property.⁷⁶ The association is governed by the board of directors, composed of owners in the association. Therefore, community association owners govern and control association operations. When making telecommunications choices, all owners have the opportunity to provide input into the selection of services and providers. When exclusive agreements are considered, it is only an attempt to attract a provider or guarantee better services or rates for community association residents. Community associations should retain all rights to enter into exclusive contracts.

Many participants in this proceeding have supported the concept of permitting the exclusivity provision of existing contracts to be terminated as new competitors enter a new region.⁷⁷ CAI, NAHC, and CHC support the principle behind the concept, since it would permit many community associations to negotiate more competitive agreements with new providers. While this type of regulation could benefit community associations, CAI, NAHC, and CHC understand that there may be constitutional and other legal issues involved in promulgating such a rule. The FCC should examine these issues carefully before adopting any rule permitting early termination of exclusivity provisions.

For the foregoing reasons, the FCC should refrain from prohibiting or abrogating exclusive contracts. Community associations need to retain the option of entering into exclusive contracts to obtain advanced telecommunications services.

⁷⁶ Ownership in community associations is determined by the legal form of the association. In condominium associations, all unit owners own common property as tenants in common. In cooperative associations, all residents own stock in the corporation that owns the cooperative. In planned communities, homeowners own a lot, while the association owns all common property. Owners in planned communities are members of the association.

⁷⁷ Comments of PCIA, 11, n.19; Comments of WCA, 31; Comments of WinStar, 25.

IV. THE FCC LACKS THE AUTHORITY TO EXTEND THE OTARD RULE TO COVER ADDITIONAL TYPES OF ANTENNAS

The *Notice of Proposed Rulemaking* requested Comments on granting WCA's proposal to extend the OTARD Rule to cover additional types of antennas, particularly fixed wireless antennas. Many providers support such an extension.⁷⁸ They assert that the FCC has the authority to extend the OTARD Rule pursuant to ancillary authority conferred by Sections 4(i) and 303(r).⁷⁹ They also contend that Section 706 of the Telecommunications Act grants the FCC the authority to extend the OTARD Rule.⁸⁰ However, Congress enacted Section 207 with a specific purpose: to preempt certain state and local government and association restrictions on particular types of video reception devices. Congress did not grant the FCC unlimited authority to preempt all governmental and community association restrictions on all types of small antennas. If Congress had intended to do so, then the language of Section 207 would have included references to these types of antennas. Since the language of Section 207 is limited to video antennas, the FCC should not presume that it has the authority to preempt governmental and community association restrictions on other types of antennas.

The parties supporting expansion of the OTARD Rule also point to the FCC's decision to expand the original OTARD Rule to include all types of multipoint distribution service (MDS) antennas, not merely the multichannel multipoint distribution service (MMDS)

⁷⁸ Comments of PCIA, 34, Comments of Teligent, 44; Comments of WCA, 10-13; Comments of WinStar, 38, 72.

⁷⁹ Comments of WCA, 11; Comments of WinStar, 74.

⁸⁰ Comments of PCIA, 34-35; Comments of WinStar, 74.

antennas included in Section 207.⁸¹ However, in this situation, the FCC only extended the OTARD Rule because MMDS antennas were a type of MDS antenna, all of which were the same size providing similar video reception services. The types of antennas WCA proposes to include in the OTARD Rule are not similar video reception devices. They are wireless transmission and reception antennas, designed for data and voice transmissions. Therefore, WCA and its supporters cannot rely on the narrow expansion of the OTARD Rule in the *OTARD First Report and Order* to justify its request for an expansion of the OTARD Rule to cover unrelated types of antennas.

Several providers are using this proceeding as an alternative means of requesting the FCC to expand the OTARD Rule to cover community association common property.⁸² However, the FCC has already correctly determined that the OTARD Rule cannot be extended to permit individual antenna installations on common property due to the takings issues raised in the OTARD proceeding and this proceeding. Therefore, the FCC should not use this proceeding to overrule its previous correct decision in the *OTARD Second Report and Order*.

V. THE FCC SHOULD EXTEND ITS CABLE INSIDE WIRING RULES TO COVER ALL PROVIDERS

In the *Notice of Proposed Rulemaking*, the FCC requested Comments about the interrelationship of its cable inside wiring rules and the proposals in this proceeding.⁸³

⁸¹ Comments of Teligent, 44; Comments of WinStar, 38.

⁸² Comments of WinStar, 71.

⁸³ *Notice of Proposed Rulemaking*, paragraph 68.

Many Commenters opposed extending the current cable inside wiring rules to telecommunications providers, arguing that the cable inside wiring rules would never apply to ILECs, since they had a “legally enforceable right” to remain on association property.⁸⁴ Others assert that application of the cable inside wiring rules would not solve the problem of gaining access to inside wiring.⁸⁵ CAI, NAHC, and CHC recognize these issues, but still support the extension of the cable inside wiring rules to telecommunications providers.

VI. THE FCC SHOULD SEEK TO ADOPT UNIFORM DEMARCATION POINT RULES

In this proceeding, there is great divergence among Commenters on demarcation point issues. Many telecommunications providers support rules setting the demarcation point at the minimum point of entry (MPOE),⁸⁶ while others support declaring a more flexible set of demarcation points.⁸⁷ CAI, NAHC, and CHC support a uniform set of rules governing the demarcation point for both cable and telecommunications services, as long as these rules preserve association flexibility and control over association property.⁸⁸ Such uniformity is logical and important as technologies and services converge.

⁸⁴ Comments of the RAA, 72.

⁸⁵ Comments of ICTA, 7; Comments of RCN, 2.

⁸⁶ Comments of ALTS, 22; Comments of Optel, 5-7; Comments of PCIA, 32; Comments of Teligent, 76; Comments of WinStar, 65.

⁸⁷ Comments of the Counties, 25; Comments of Cornerstone Properties, 32; Comments of the United States Telephone Association (USTA), 13.

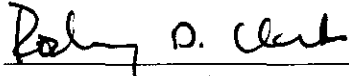
⁸⁸ Comments of Cornerstone Properties, 32; Comments of USTA, 13.

CONCLUSION

This proceeding was opened to explore methods of promoting competition in the local telecommunications marketplace. Unfortunately, most of the proposals outlined in the *Notice of Proposed Rulemaking* and the telecommunications providers' Comments would not promote that competition. Instead, forced entry proposals would severely retard the growth of this marketplace, while simultaneously eviscerating community associations' property rights, destroying the democratic decision-making process in community associations, and damaging community associations' property and operations. Due to these deleterious effects on community associations, the FCC should refrain from promulgating any forced entry regulation. The FCC should also refuse to extend the OTARD Rule to cover additional types of antennas, since it has no authority to do so.

The FCC can assist the expansion of this dynamic marketplace best by refraining from regulating it. The free market will continue to foster competition while the forced entry initiatives in this proceeding would only hinder the expansion of the local telecommunications marketplace. The FCC should not heed the spurious claims of those telecommunications providers that seek to maximize profits by requiring community association homeowners to subsidize their business plans. Forced entry initiatives are unconstitutional, unnecessary, and represent unsound public policy. The FCC should reject all of the forced entry proposals presented in this proceeding.

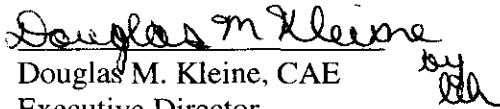
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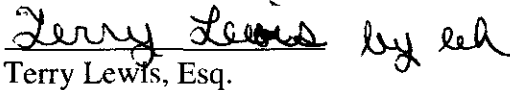
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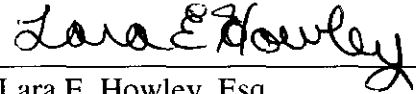
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I hereby certify that on this 27th day of September, 1999, I caused true and correct copies of the foregoing "Reply Comments of the Community Associations Institute" to be served via first class mail, postage prepaid.



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